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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/585,209	05/30/2007	Frederic Simonet	06028.0131	9616

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EXAMINER
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MATTISON, LORI K

ART UNIT	PAPER NUMBER
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1619

MAIL DATE	DELIVERY MODE
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10/07/2011

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/585,209	<b>Applicant(s)</b> SIMONET ET AL.
	<b>Examiner</b> LORI K. MATTISON	<b>Art Unit</b> 1619

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 01/21/2010.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1 and 20-37 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1 and 20-37 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |   |
|---|---|
| <p>1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)</p> <p>2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)</p> <p>3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br/>           Paper No(s)/Mail Date _____.</p> | <p>4) <input type="checkbox"/> Interview Summary (PTO-413)<br/>           Paper No(s)/Mail Date. _____.</p> <p>5) <input type="checkbox"/> Notice of Informal Patent Application</p> <p>6) <input type="checkbox"/> Other: _____.</p> |
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## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on January 21, 2010 has been entered.

### ***Claim Status***

2. Applicant's arguments and amendments to claims 1, 20, 21, 24-27, 29, 33, 34, and 35, filed 01/21/2010, are acknowledged and have been fully considered.

Claims 1 and 20-37 are pending.

Claims 2-19 are cancelled.

No claims are withdrawn.

Claims 1 and 20-37 have been examined on the merits.

### ***Priority***

3. Receipt is acknowledged of papers submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

### ***Withdrawn Objections/ Rejections***

4. The objection to the specification is withdrawn due to Applicant's amendment.

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5. The objection to claims 1, 24-27, 29, and 33-35 are withdrawn due to Applicant's amendments to the claims.
6. The objection to claims 22, 28, 30, and 36 are withdrawn upon further consideration.
7. The rejection of claims 23 and 36 under 35 USC 103(a) over WALSH, as evidenced by the *Merquat 100 Product Information Guide* and Dahms is withdrawn upon further consideration.
8. The rejection of claim 28 under 35 USC 103(a) over WALSH (as evidenced by the Merquat 100 product information guide and DAHMS), in view of Murray is withdrawn upon further consideration.

**Maintained Rejections**

9. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

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10. Claim 1 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

**This is a new matter rejection.**

Instant claim 1 recites a surfactant medium which comprises a cosmetically acceptable aqueous medium. The reply filed 1/21/2010 states the literal language of the claim is not present (Reply, pg. 16, ¶ 3). Applicant argues the claim need not be described literally (Reply, pg. 16, ¶ 3). Applicant argues the skilled artisan would understand surfactant, salt and cationic polymer, when mixed into a cosmetically acceptable aqueous medium do not constitute a composition separate from the aqueous medium (Reply, pg. 17, ¶ 1). This has been fully considered but is not found persuasive. The disclosure states, "According to the invention, the cosmetic composition of water-in-water emulsion type comprises, in a cosmetically acceptable aqueous medium: [0014] at least one surfactant, [0015] at least 2.25% by weight, relative to the total weight of the composition, of at least one water-soluble mineral or organic salt comprising, when it is organic, from 1 to 7 carbon atoms in the anion, [0016] at least 0.5% by weight, relative to the total weight of the composition, of at least one cationic polymer with a weight-average molecular mass of greater than 10,000, in a water-soluble salt(s)/cationic polymer(s) weight ratio of greater than or equal to 4.5, preferably ranging from 4.5 to 19 and better still from 4.5 to 15." (pg. 3, ¶2). Therefore, the recited *surfactant medium* comprising a cosmetically acceptable aqueous medium *is of different scope* from a "*cosmetically acceptable aqueous medium*" which then comprises a surfactant as described by the instant specification. Thus, the disclosure does not contemplate a

*surfactant medium* that comprises a cosmetically acceptable medium. Thus, the specification does *not* provide sufficient support for the claim amendments by changing the scope of the disclosure; thereby, constituting new matter.

### ***Claim Rejections - 35 USC § 102***

11. Claims 1, 20-22, 24-27, 29-32, 34, 35, and 37 **stand rejected** under 35 U.S.C. 102(b) as being anticipated by Walsh as evidenced by the *Merquat 100 Product Information Guide* and Dahms (see Paper No. 20081022 for all citations) for the reasons of record in Paper No. 20090810.

### **Response to Arguments**

Applicant alleges that butyl diglycol is also known as butoxydiglycol (Reply, pg. 20, ¶ 2; pg. 25, ¶2). Applicant alleges that butyl diglycol/butoxydiglycol is not a surfactant but rather a solvent (Reply, pg. 20, ¶s 2 and 3).

In response, as evidenced by US Patent No. 4,485,873 (BALZER), butyl diglycol has been recognized as a cosurfactant (i.e. surfactant) since at least 1984 (col. 6, lines 55-60).

Applicant alleges WALSH does not clearly and unequivocally disclose that Example 4 is a water-in-water emulsion (pg. 21, ¶ 3-pg. 25, ¶ 2).

In response, the WALSH reference teaches the recited reagents in the recited amounts. Thus, WALSH is necessarily a water-in-water emulsion. M.P.E.P. § 2112.01 states, “Products of identical chemical composition can not have mutually exclusive properties. A chemical

composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. *In re Spada* 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).”

Applicant argues the teachings of the instant specification which state "The Applicant has discovered, surprisingly, that droplets enriched in cationic polymer can be obtained in a surfactant medium by mixing together certain amounts of cationic polymer and of water-soluble salt in a surfactant medium." ***does not necessarily*** produce a water-in-water emulsion (Reply, pg. 21).

In response, Applicant appears to be arguing they have not provided an enabling disclosure since a surfactant medium comprising certain amounts of cationic polymer and of water-soluble salt in a surfactant medium does not necessarily yield a water-in-water emulsion. Is this truly what Applicant meant to argue?

The instant specification teaches three examples according to the invention (specification, page 20). The sodium lauryl ether sulfate is the surfactant used in the examples of Applicant's own specification. WALSH teaches and exemplifies sodium lauryl ether sulfate. The instant claim recites at least one surfactant is present and WALSH teaches and exemplifies a combination of sodium lauryl ether sulfate and butyl diglycol surfactants in an amount of 4.6 % of the composition (WALSH-Example 4). The examples according to the invention use water as the cosmetically acceptable aqueous medium (pg. 20). WALSH teaches and exemplifies water as the cosmetically acceptable medium (Example 4). The three examples according to the invention use sodium chloride as the water mineral salt and claim its inclusion in an amount of at least

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2.25% (specification, pg 20; instant claim 1). WALSH teaches and exemplifies inclusion of sodium chloride in an amount of 12% (Example 4). Example 1 according to the invention utilizes Merquat 100 in an amount of 1% (instant specification, pg. 20). WALSH teaches and exemplifies Merquat 100 in an amount of 1.0% (Example 4). Example 2 according to the invention teaches a salt to cationic polymer ratio of 13.4. Instant claim 1 requires the ratio to be greater than 2.5. WALSH teaches and exemplifies a ratio of 12.0 (specification, page 20). Therefore, WALSH's composition is necessarily a water-in-water emulsion because WALSH's composition utilizes the same reagents as that exemplified in the specification and/or claimed by instant claim 1 in the same exemplified and/or claimed amounts. Applicant arguments are unsubstantiated.

Applicant argues Walsh is a single phase composition and does not form liquid crystals until it is substantially dilution (pg. 21-25). Therefore, Walsh does meet every limitation of the claim because it is a single phase solution (pg. 25 ¶ 2).

Applicant's argument is not persuasive because the argument is not commensurate in scope with the instant specifications teachings of water-in-water emulsion. Applicant's own specification states, "The Applicant has discovered, surprisingly, that droplets enriched in cationic polymer can be obtained in a surfactant medium by mixing together certain amounts of cationic polymer and of water-soluble salt in a surfactant medium. The addition of the water-soluble salt makes it possible to avoid the formation of insoluble complexes between the cationic polymer and the surfactant(s) of the medium. This type of system will be referred to herein below as a water-in-water emulsion. (pg 1, last ¶; pg 2, first ¶). (emphasis by the examiner).



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Notably, the specification does not require a water-in-water emulsion to be two different phases (i.e. droplets of cationic polymer in a surfactant medium). All the teachings of the instant specification require is that a mixture of cationic polymer, water-soluble salt, and surfactant medium *be able* produce droplets to be a water-in-water emulsion. As admitted by Applicant, Walsh's composition *can* produce liquid crystals (i.e. droplets). Therefore, the composition of Walsh is a water-in-water emulsion as taught by the instant specification.

**New Grounds of Rejection**

12. Claims 23, 28, and 36 **are rejected** under 35 U.S.C. 102(b) as being anticipated by WALSH as evidenced by the *Merquat 100 Product Information Guide* and Dahms (see Paper No. 20081022 for all citations).

WALSH teaches perfume oil (i.e. a synthetic oil) and the synthetic thickeners; hydroxyethylcellulose, hydroxypropylcellulose, polyacrylamide, and polyethylene glycol; are suitable for inclusion in the composition (col. 5, lines 15-35; Example 1-col. 6; instant claim 36). WALSH teaches and exemplifies inclusion of an amphoteric surfactant to yield a surfactant which is a combination of an anionic surfactant and an amphoteric surfactant (col. 5, lines 15-25; Example 1-col. 6; Example 2-col. 7; instant claim 23).

WALSH teaches inclusion of alkyl betaines and teaches that generally for surfactants having an alkyl chain, this chain should have more than 8 carbon atoms (i.e. >C8 alkyl betaine; column 3, lines 50-60; instant claim 28).

### **Response to Arguments**

Applicant argues that Walsh does not provide reasons to modify Example 4 to arrive at the claimed composition (Reply, pg. 26, last ¶; pg. 27, last ¶)

Applicant's argument is moot in light of the new grounds of rejection above. Applicant's traverse is considered to the extent that it applies to the new grounds of rejection above. WALSH teaches the recited reagents and in the recited amounts. "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir.1987). " (see M.P.E.P. § 2131).

### ***Claim Rejections - 35 USC § 103***

13. Claims 1, 20-32, **33**, and 34- 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over WALSH (as evidenced by the *Merquat 100 Product Information Guide* and Dahms) in view of HERB (see Paper No. 20081022 for all citations).

**Claim Summary:** The claim generally recites that the cationic polymer may be a cellulose ether derivative comprising quaternary ammonium groups.

The teachings of WALSH (as evidenced by the *Merquat 100 Product Information Guide* and Dahms) are relied upon as above herein.

However, WALSH does not teach inclusion of a cationic polymer which may be a cellulose ether derivative comprising quaternary ammonium groups as set forth by instant claim 33.

HERB teaches an emulsion which comprises a surfactant system that is capable of forming lamellar liquid crystals around droplets of the primary emulsion (col 3, lines 25-40). HERB teaches polyquaternium-10 (i.e. cellulose ether derivative comprising quaternary ammonium groups) is an exemplary water soluble quaternary compound for inclusion in lamellar liquid crystal emulsions for conditioning hair (col. 10, lines 10-end; col.11, lines 1-15). HERB goes on to teach the constituents of this lamellar liquid crystal emulsion may be materials for the hair such as hair conditioners and dyes (col.3, lines 35-45).

With regard to instant claim 33, it would have been *prima facie* obvious to a person of ordinary skill in the art at the time the invention was made to have modified the composition taught by WALSH by adding polyquaternium-10 (i.e. cellulose ether derivative comprising quaternary ammonium groups) to the composition because WALSH teaches inclusion of cationic polymer in the hair rinse conditioner and polyquaternium-10 is an exemplary water soluble quaternary compound for inclusion in lamellar liquid crystal emulsion for conditioning hair. The skilled artisan would have been motivated to add polyquaternium-10 to the composition, with an expectation of success, to support the formation of liquid crystals while providing good hair conditioning benefits to the hair conditioning composition.

### **Response to Arguments**

Applicant argues HERB is directed to water-in-oil-water emulsions and provides no assistance in modifying WALSH to arrive at a water-in-water emulsion (Reply, pg. 28, first ¶).

Applicant's argument is not persuasive. The teachings of WALSH as the reference pertains to water-in-water emulsions has been addressed above.

***Conclusion***

14. **No claims are allowed.**

15. Any inquiry concerning this communication or earlier communications from the examiner should be directed to LORI K. MATTISON whose telephone number is (571)270-5866. The examiner can normally be reached on 8am-6pm (Monday-Thursday).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, DAVID BLANCHARD can be reached on (571)272-0827. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/LORI K MATTISON/  
Examiner, Art Unit 1619  
September 22, 2011

/ROBERT C. HAYES/  
Primary Examiner, Art Unit 1649